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SUBCOMMITTEE ON TELECOMMUNICATIONS & THE INTERNET
Of The
COMMITTEE ON ENERGY & COMMERCE
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Mr. Chairman, Ranking Member Markey, Members of the Subcommittee, thank you for inviting me to speak to you regarding your efforts to draft a new charter for broadband, Voice over IP and Video services to truly unlock the potential of broadband for American businesses and consumers.

For ten years, EarthLink has been on the cutting edge, delivering first dial-up, then broadband and now VoIP, wireless voice and municipal wireless Internet services to the American public. Over the past ten years, we've seen the Internet grow from the specialized province of a few tech-savvy early adopters to an integral part of American work and family life. And we've seen – and helped – millions of Americans move toward broadband services and capabilities that were not possible with dial-up services.

Our approach has been to deliver our customers the services they want: we revolve around our customers. And we've been successful. Over the past three years, EarthLink has won numerous awards for customer satisfaction in both broadband and

dial-up services. We now deliver to our customers a full-range of broadband services and applications, including Internet access, Voice over IP, and wireless services. We offer our customers a wide range of enhanced offerings, including pop-up, spam and spyware blockers, anti-virus protection, and parental controls. And we are excited to be working with the City of Philadelphia to deploy a new wi-fi network providing the residents of that city an alternative to the cable – telephone company high-speed wireline access duopoly.

At the outset, I'd like to commend the Committee and Subcommittee, and particularly its staff, for all the hard work you have put in so far. The staff discussion draft takes many key steps to provide an appropriate regulatory framework for broadband communications. But, the draft also takes some half-steps that should be improved and some missteps that should be reversed.

As you consider further how to shape the legislation that has moved forward, I would like to leave you with three key thoughts:

- 1. Keep the consumer's ability to choose his or her service providers foremost in mind;**
- 2. Follow the successful lessons learned in the overwhelming growth of wireless communications over the past ten years; and**
- 3. Stabilize the regulatory environment to permit all market participants to invest in delivering services to consumers.**

I. Empowering Consumer Decisions

Consumers are, of course, whom we all seek to serve. Laws and rules in the telecommunications sector are the most successful when they allow the market to deliver new and innovative products to consumers and empower consumers to freely choose the products and services that best suit their needs.

To make sure that consumers can freely exercise choice in the market, the staff has wisely included provisions to ensure that broadband transmission providers do not block or interfere with a consumer's attempt to use any lawful content, application or service available over the Internet. Moreover, while a broadband network operator may offer its own high quality services and manage network and routing to do so, it cannot unreasonably impair or interfere with access to or use of other lawful Internet content, applications or services while doing so. These basic consumer empowerment principles will ensure that consumers can continue to have access to the services they want in the broadband marketplace.

I have three suggestions with respect to these provisions. First, these provisions (and indeed all the provisions with respect to BITS services and providers) should apply to service providers that purchase and resell BITS to subscribers.¹ For example, EarthLink purchases BITS from such partners as Covad, and EarthLink should be subject to the rights and responsibilities of a BITS provider when it sells a broadband Internet access service to consumers.

¹ As currently drafted in the November 3, 2005 Staff Draft, the definition of BITS is limited to a person that providers or offers to provide BITS, either directly or through an affiliate, "over facilities the service provider or its affiliate owns or controls." This could be expanded to include resold services by modifying the language to read "over facilities or services the service provider or its affiliate owns or controls, or purchases for resale."

Second, the Subcommittee should make clear that whenever a BITS provider exercises its “preserved authorities” in subsection 104(b) of the November 3, 2005 Staff Draft, it cannot do so in a manner that favors the content or applications provided by itself or its affiliates. For example, the draft permits a BITS provider to offer service plans that involve varied and reasonable bandwidth or network capacity limitations, provided there is advance notice to subscribers. This is reasonable so long as the subscriber can use her bandwidth or network capacity as she sees fit, within the limitations. However, the Subcommittee should make clear what I believe is the intent – that this provision does not permit, for example, a BITS provider to provide a higher capacity service only if the subscriber uses the BITS provider’s content or application.² Moreover, if a BITS provider makes a network management decision (such as to prefer voice packets over video packets), that should apply to all voice packets, not just the BITS provider’s voice packets. Put another way, if a customer decides to purchase the right to use the “fast lane” service, it should be able to use the “fast lane” for all her applications and content, not just the applications and content that the BITS provider would prefer.

Third, these provisions should be applied to all broadband Internet transmission services, even when those services may be packaged with other voice or video services. To the extent that the definition of “broadband video service” is meant to permit the offering of broadband Internet access or VoIP services without complying with the

² The same is true with respect to value-added consumer protection services, measures to protect network security and reliability, and network utilization and routing management to permit the offering or carriage of broadband video services or other enhanced quality services. Such favoritism should never be considered “reasonable.”

requirements applicable to those services (including, for example, E911 for VoIP),³ that approach would provide regulatory preference, not regulatory parity, to the broadband video provider.

In another provision that promotes consumer choice, the staff draft also wisely includes provisions that ensure that consumers can port their telephone numbers to VoIP providers, and that VoIP service providers can obtain North American Numbering Plan telephone numbers to offer their services. This will help consumers switch to (or away from) VoIP service providers, without interference from a service provider that may be dismayed at losing a customer.⁴

Along these same lines, the staff draft would be improved if it also precluded broadband service providers (i.e., in the language of the staff draft, BITS providers) from requiring consumers who want to purchase broadband Internet access to also purchase the BITS provider's voice services. As the Committee is well aware, in many instances, consumers who want to purchase DSL service must also purchase voice telephone service. Those types of requirements frustrate consumer choice by precluding consumers from buying DSL service from a BITS provider, while using another provider's VoIP service in lieu of the BITS provider's traditional circuit-switched (or VoIP) voice service. As conditions of their megamergers, the nation's two largest ILEC BITS providers, Verizon and SBC, have just committed to offer such stand-alone or "naked" DSL services to 80% of their customers for two years. Qwest currently offers stand-alone

³ See § 2(5)(B) of the November 3, 2005 Staff Draft.

⁴ In addition, the Committee should slightly broaden the definition of VOIP service. Rather than limiting VOIP service to a voice communications service provided over BITS, *see* Staff Draft § 2(21)(A), the Committee should define VoIP service to include any voice communications service that does not use circuit switching on the VoIP subscriber's end of the call. That would avoid artificial distinctions between services that convert a voice signal into IP on the customer's premises, as opposed to in a NID, a network node, or in a softswitch. Such a definition would not sweep in "dial-up" services in which a VoIP user calls through the circuit-switched PSTN to reach a VoIP platform.

Internet access services. All consumers should be given this choice, unfettered by tying arrangements designed to protect legacy businesses.

II. Following the Successful Lessons from Wireless.

Over the past ten years, we have seen an explosive growth in wireless services. In 1994, there were fewer than 20 million wireless subscribers; today, there are nearly 200 million – a ten-fold increase. As you study what steps to take with respect to broadband, the history of wireless and wireless regulation since 1994 provides some very clear and useful lessons:

- 1. A facilities-based duopoly is not enough to drive competition and innovation to the benefit of consumers.**
- 2. Expanding the number of facilities-based alternatives is critical.**
- 3. In addition to limiting state rate and entry regulation, fair interconnection with incumbent networks must be safeguarded and ensured.**
- 4. New services need adequate time to implement new mandates, without threats of service shut-offs.**

A. Facilities-Based Duopoly is not Sufficient.

The history of wireless cautions strongly against relying on a facilities-based duopoly to deliver strong competitive choices and marketplace innovation to consumers. From 1984 until the first broadband PCS services began to be offered in 1995, wireless services were offered in a legally-sanctioned duopoly. Per-minute prices for wireless service peaked in 1993, the same year Congress voted to authorize new wireless entry

through spectrum auctions.⁵ Duopoly created wireless services that were priced for only a few, which relegated wireless to a niche market.

On the other hand, since the third and fourth (and more) wireless competitors entered the market in 1995-96, competition in the wireless market has exploded. As stated above, wireless subscribers have soared from only 20 million in 1994 to nearly 200 million as of June 2005. In 1993, wireless service averaged 58 cents per minute,⁶ but by the end of 2004 was averaging 9 cents per minute – a nearly 85 % drop.⁷

The same market performance can be expected in broadband as well. If there are only two facilities-based broadband providers, competition will stagnate and consumers will not reap the full benefits of the broadband revolution. Broadband today is characterized by a cable-telco duopoly, with cable modem service and DSL together accounting for 97.5% of all residential and small business broadband connections. And of these services, cable companies and incumbent LECs each control over 95% of these respective offerings. However, if a stable duopoly is not permitted to develop, the market will keep competitive pressure on all providers and force the two dominant facilities-based providers, cable and ILEC DSL, along with all other market participants, to continue to innovate to the benefit of consumers. For this reason, the bill should clarify that other facilities-based competitors (including those that use their own switches and routers) are vital if consumers are to reap competition's rewards.

⁵ See http://wireless.fcc.gov/statements/010620cmrsSugrue_slides.ppt

⁶ *Id.*

⁷ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Tenth Report, WT Docket No. 05-71, FCC 05-173, at ¶ 158 (rel. September 30, 2005).

B. Expanding Facilities-Based Alternatives is Critical.

In wireless, it was Congress, through the enactment of the Omnibus Budget Reconciliation Act of 1993, which made additional spectrum available through the then-innovative mechanism of spectrum auctions in order to allow new competitors to emerge.

This Subcommittee now has the same opportunity with respect to broadband. In its draft, the staff takes a major step towards ensuring the development of additional broadband platforms by precluding states and local governments from prohibiting municipal or other government-owned entities from providing broadband services. As a major participant in the development of municipal broadband services, EarthLink commends the staff for its inclusion of this provision. This is one way to help ensure that competitive choices continue to develop.

[Please refer to Appendix for details on EarthLink's Wireless Philadelphia broadband services.]

And this Committee is separately considering, in the context of digital television legislation, how to expedite the digital transition so that additional spectrum would become available not just for public safety, but also for licensed and unlicensed wireless broadband services.

But more can be done, particularly during the interim period between now and whenever a third or fourth broadband transmission facility (whether wired or wireless) clearly emerges and becomes widely available to consumers. Today, EarthLink, together with its partners, uses unbundled loops leased from the ILEC to provide alternative broadband services. These UNE loop-based offerings are themselves independent, facilities-based offerings, as EarthLink and its partners provide the electronics and IP

features and functions to make these services distinctive and innovative. As discussed further below, the Committee should ensure that these UNE loops continue to be available, on the same terms and conditions as they are available today, to permit consumers to have these additional broadband service choices. That would ensure that consumers are not subject to a facilities-based duopoly while other modes of broadband transmission develop.

Of course, in order to ensure that a sufficient number of competitive alternatives develop to prevent a continued broadband duopoly, it is also important to prevent the dominant cable and incumbent telephone companies from acquiring one another within the same territory. That is why Section 652 of the Communications Act today precludes cable operators and local exchange carriers from acquiring one another within their service territories.⁸ The same prohibitions should still apply even if the cable operator reclassifies itself as a “broadband video services provider” or the incumbent LEC classifies itself entirely as a BITS or VoIP provider, and the bill should make clear that cable companies and ILECs cannot “end run” section 652 by reclassifying themselves under this bill.

⁸ See 47 U.S.C. § 572.

C. Ensuring Fair Interconnection and Traffic Exchange.

For wireless services, in addition to Congress' 1993 preemption of state rate and entry regulation, one of the keys to growth and expansion was the 1996 Act's guarantees of fair terms and conditions for interconnection.

Prior to the 1996 Act, wireless faced extremely unbalanced terms when it exchanged traffic with incumbent local telephone companies. In some cases, wireless carriers paid the incumbent telephone company for every minute of traffic that the wireless carrier received from the incumbent LEC, and it also paid the incumbent LEC for every minute of traffic that originated from a wireless customer but terminated to a telephone number on the traditional public switched network.⁹ These arrangements were hardly surprising. In 1996, wireless carriers were much smaller than the incumbent LECs, and had many fewer subscribers. Few incumbent LEC subscribers would therefore be inconvenienced if they were unable to call out to, or receive calls from, a wireless customer. However, the wireless carriers were dependent upon the incumbent LECs to handle all but the then very small fraction of calls placed between wireless consumers. The incumbent LECs were thereby able to use their market power over interconnection to extract fees from wireless carriers, regardless of whether traffic originated from the incumbent LEC's wireline customer or from the wireless carrier's

⁹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd. 15499, 16037, 16044 (1996)(*"Local Competition Order"*)(CMRS carriers complain "that they are unable to negotiate interconnection arrangement based on mutual or reciprocal compensation because of incumbent LEC bargaining power;" "the problem of achieving mutual compensation is further compounded because incumbent LECs not only charge rates that bear no relationship to their costs but also refuse to compensate CMRS providers for termination of landline-originated calls;" "incumbent LECs even charge CMRS providers for terminating incumbent LEC-originated calls"; "we conclude that, in many cases, incumbent LECs appear to have imposed arrangements that provide little or no compensation for calls terminated on wireless networks, and in some cases imposed charges for traffic originated on CMRS providers' networks.")

customer. From the ILEC's perspective, it was able to insist on "heads I win, tails you lose" compensation for traffic exchange. This allowed the incumbent LECs to raise wireless carriers' costs, thus inflating the prices that wireless carriers had to charge to their customers and thereby limiting wireless carriers' competition with landline services.

The 1996 Act changed all of that. Under the 1996 Act, for all local calls, an incumbent LEC could charge a wireless carrier (or, for that matter, a CLEC) for traffic that the wireless carrier originated, but could no longer charge a wireless carrier for traffic that the originated from an incumbent LEC's own customer.¹⁰ Moreover, under the 1996 Act, the wireless carrier is entitled to compensation for all local traffic that originates on the ILEC's network and terminates on the wireless carrier's network, and the rate the ILEC paid the CMRS carrier had to mirror the rate that it charged the CMRS carrier. Furthermore, the FCC ruled that reciprocal compensation rules would apply to all CMRS traffic that originated or terminated within a "Major Trading Area," a large region used for PCS licensing that was much larger than traditional ILEC local calling areas.

There were two significant results from these changes with respect to wireless intercarrier compensation. First, incumbent local telephone companies could no longer use traffic exchange fees to increase a wireless carrier's costs and thus prevent a wireless carrier from offering prices that would compete with the incumbent local telephone company's core services. By making these charges cost-based and symmetrical, the 1996 Act allowed wireless carriers to compete for customers across the consumer market – with the result that today there are more wireless subscribers than wireline lines

¹⁰ Technically, the 1996 Act's reciprocal compensation rules apply to all traffic that is not interstate or intrastate exchange access, information access or exchange services for such access. *See* 47 C.F.R. 51.701.

nationwide.¹¹ Second, because the traffic exchange fees that wireless carriers paid were no longer strictly tied to ILEC traditional wireline local calling areas, wireless carriers were able to offer regionwide and national calling plans. This led directly to the emergence of today's popular wireless one-rate bucket pricing plans.

Unfortunately, rather than extending the successful wireless interconnection and traffic exchange provisions to broadband services, and particularly to VoIP services that are exchanged with traditional PSTN providers, the staff draft misses the core teachings of the wireless experience and fails to apply those lessons to broadband. Unlike the 1996 Act's reforms, the staff draft would permit the large incumbent telephone companies to impose on smaller competitors whatever compensation regime, at whatever price level, they wanted. Particularly with respect to VoIP, there is no reason to believe that the large incumbent LECs won't immediately seek to replicate the types of compensation arrangements that they had in place with respect to wireless carriers before 1996. Like pre-1996 wireless carriers, VoIP providers will be very small relative to the incumbent LECs, and will have a much greater need both to receive calls from and terminate calls to the ILEC's customers than the ILEC will need to do with respect to the VoIP provider's customers. This asymmetric market power is exactly what led to the asymmetric charges between incumbent LECs and wireless carriers prior to 1996. Should the large incumbent telephone companies be able to impose those unbalanced, asymmetric charges far above cost-based levels, the incumbents will be able to squeeze VoIP out of

¹¹ Indeed, while wireless carriers were afforded interconnection in 1993, *see* 47 U.S.C§ 332(c)(1)(B), it was the symmetrical interconnection requirements of the 1996 Act that spurred rapid change. For example, the innovative one-rate plans that now characterize the wireless market were introduced in 1998. *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Fourth Report, 14 FCC Rcd. 10145, 10155-6 (1999).

competition for mainstream consumers, and relegate VoIP to a niche – much as wireless occupied only a niche prior to 1996.

Furthermore, although the staff draft permits direct and indirect interconnection, it does not permit a party to insist on direct interconnection, even for VoIP, when that is more efficient, as the 1996 Act did.

A better solution would be for this Committee to heed the lessons of the wireless experience and to embrace a single, symmetrical mechanism for traffic exchange, particularly where it involves the exchange of VoIP traffic with traditional telephone providers. Both the pre-1996 Act marketplace and the history of post-1996 Act intercarrier compensation regulation (including the FCC's need to step in and regulate CLEC access charges) show that traffic exchange, at least with the PSTN, must be subject to cost-based regulation.¹² Neither do circuit-switched legacy access charges have a place in the emerging IP-based world. These changes would require substantial revisions to current Sections 103 and 203 of the staff draft. In particular, although the draft references the availability of arbitration for any complaints, there are no substantive standards that would create the basis for any complaint. Thus, the bill provides only an empty process, with no substantive protections to enforce.

¹² See *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923, 9936 (2001) (“we conclude that some action is necessary to prevent CLECs from exploiting the market power in the rates that they tariff for switched access services”).

D. Give New Services Adequate Time to Implement Mandates Without Threats of Service Shut-Offs

One other lesson learned from wireless is that the public interest is best served when new technologies are given adequate time to implement new mandates. Take, for example, wireless E911. The FCC initially mandated wireless E911 in 1996. Wireless worked steadily since 1996 to implement E911. If the FCC had forced wireless in 1996 or anytime thereafter, to suspend service to any subscriber that could not receive E911 service, we would not have the widespread, high quality wireless services we have today.

Yet that is the approach that the FCC has threatened with respect to VoIP. And like wireless, this is not an issue of a lack of will. A VoIP provider cannot yet go to a single vendor and obtain connectivity to all selective routers nationwide. For nomadic applications, solutions are just now being developed and implemented, and – like Phase II wireless E911 – only some PSAPs will be capable of receiving and utilizing nomadic E911 data. We therefore urge this committee to adopt a more phased approach and to recognize that public interest is not served by service suspensions, just as the Senate Commerce Committee recently did.

There are key elements from the S. 1063 as unanimously passed by the Senate Commerce Committee last week that are necessary. The Senate Commerce Committee recognized that providing E9-1-1 requires Incumbent phone companies to provide reasonable access to the 9-1-1 network itself, equivalent liability relief for 9-1-1 call takers, and flexibility for VoIP providers in meeting new obligations. Importantly, the legislation also ensures that VoIP customers are not cut off from vital communications services. The Senate legislation focuses not only on what is achievable today, but on

developing a comprehensive national plan for creating a next generation 9-1-1 network capable of a host of breakthrough emergency enhancements.

Equivalent liability relief for PSAPs and others – as is contained in H. R. 2418 the “IP-Enabled Voice Communications and Public Safety Act of 2005” are of particular note. Such a liability provision, the same as this Committee afforded the wireless industry in 1999, is essential because some PSAPs are being told by their counsels not to accept VoIP 911 calls (as in the case in Illinois).

III. Stabilize The Regulatory Environment To Permit All Market Participants To Invest In Delivering Services To Consumers.

Over the past three years, the regulatory rules for entities other than incumbent local telephone companies have been in a constant state of flux. First, it was unbundled local switching that was under attack. But now, even the provision of unbundled loops – the most difficult network element to duplicate – is under attack. The FCC, for example, recently adopted an order that eliminates loop unbundling in several parts of the Omaha, Nebraska market.¹³ And this is occurring even though the FCC has already given ILECs a roadmap to full deregulation: if an ILEC builds fiber to within 500 feet of a customer's residence or business, the ILEC is entirely freed of any loop unbundling obligations.¹⁴

It is time for the Congress to declare a truce that will allow non-incumbents to invest in and execute their business plans. Although the Staff Draft makes clear that the bill does not affect the rights of a telecommunications carrier to obtain unbundled network elements, it would be better to go further. The Congress should require that unbundled loops continue to be provided for a substantial interim period, say, for example, 10 years, at current rates, terms and conditions, subject to the FCC's already granted relief for fiber to the curb. Such a provision would end what would otherwise be piecemeal MSA-by-MSA litigation over loop unbundling, but allow the incumbent LECs to end unbundling to any premises to which it has implemented fiber-to-the-curb.

Furthermore, the Section 105(a) of the November 3, 2005 Staff Draft appears to truncate a number of established rights of telecommunications carriers who may also be

¹³ FCC News Release, "FCC Grants Qwest Forbearance Relief In Omaha MSA," (rel. September 16, 2005)

¹⁴ *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Reconsideration, FCC 04-248, 19 FCC Rcd. 20293 (2004).

BITS providers. While this section preserves a telecommunication's carrier's right to obtain unbundled network elements pursuant to Section 251(c)(3) and collocation pursuant to Section 251(c)(6), the enumeration of only those two sections suggests that other telecommunications carrier rights with respect to telecommunication services would not longer apply, including, among others:

- Interstate interconnection under Section 201,
- Just, reasonable and non discriminatory rates for interstate services under Sections 201 and 202,
- The right to obtain damages in Section 207,
- Number portability, dialing parity, access to rights of way, reciprocal compensation, interconnection, resale, and notices of network changes under Sections 251(b) and (c).

While a savings clause making clear that telecommunications carriers do not lose rights by also providing BITS is necessary, the savings clause should more broadly safeguard all telecommunications carrier rights under the Communications Act.

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On behalf of EarthLink, I thank the Subcommittee for the opportunity to present these views. The staff has done yeoman's work, and presented you with a thoughtful starting point for further legislative efforts. By focusing on the consumer, and by keeping in mind the lessons learned from the highly successful legislative efforts to encourage the growth and deployment of wireless services, the Committee can craft a truly pro-consumer, pro-innovation legislative framework for broadband services.